IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

DOCKET NO. 76- 1451

GLADYS E. ROGERS and MARGARET A. ROGERS,
as Co-executrixes of the Estate of
DILWORTH T. ROGERS,

Petitioners,

vs.

EXXON RESEARCH AND ENGINEERING CO.,
a Delaware corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MURRY D. BROCHIN

LEWIS J. PAPER,
DAVID W. MILLS
Attorneys for Petitioners,

Of Counsel
LOWENSTEIN, SANDLER, BROCHIN,
KOHL & FISHER
744 Broad Street,
Newark, New Jersey 07102

N.J. Appellate Printing Co., Inc., South Plainfield, New Jersey (201) 753-0200

TABLE OF CONTENTS

CASES CITED:

TABLE OF CONTENTS

TABLE OF CONTENTS

SUPREME COURT OF THE UNITED STATES

October Term, 1976

Docket No. 76-

GLADYS E. ROGERS and MARGARET A. ROGERS,
as Co-executrixes of the Estate of
DILWORTH T. ROGERS,

Petitioners,

vs.

EXXON RESEARCH AND ENGINEERING CO.,
a Delaware corporation,

Respondent.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit. The judgment of the Court of Appeals vacated the judgment of the United States District Court for the District of New Jersey which had been entered against Exxon Research and Engineering Company (hereinafter "EREC" or the "company") adjudging that EREC had arbitrarily discharged Dr. Dilworth T. Rogers, deceased, from employment in violation of the Age Discrimination in Employment Act, 29 U.S.C. §621, *et seq.* (hereinafter "ADEA" or the "Act").

OPINIONS BELOW

The trial court's opinion is reported at 404 F. Supp. 324 (D.N.J. 1975) and is attached hereto as Appendix A. The opinion of the Court of Appeals for the Third Circuit is not yet reported and is attached hereto as Appendix B.

JURISDICTION

On January 31, 1975, a jury returned a verdict in petitioners' favor and against EREC on the grounds that EREC violated the ADEA when it retired Dr. Rogers. The parties stipulated that Dr. Rogers' out-of-pocket losses amounted to $30,000. On February 4, 1975, the jury returned a verdict awarding petitioners $750,000 in damages for "pain and suffering." On May 16, 1975, the trial court denied EREC's post-trial motions in light of petitioners' willingness to accept a remittitur of $550,000 of the "pain and suffering" award. On November 18, 1975, the trial court entered a final Order and Amended Judgment in favor of petitioners in the amount of $335,946 (including attorneys' fees), plus statutory costs.

EREC appealed from the trial court's judgment to the United States Court of Appeals for the Third Circuit. Petitioners cross-appealed on three separate issues. The United States Court of Appeals for the Third Circuit remanded the case to the District Court for a new trial in accordance with the opinion of the Court of Appeals. This Court's jurisdiction is founded upon 28 U.S.C. §1254(1).

There are special and important reasons why, in the exercise of sound judicial discretion, a writ of certiorari should be granted in this case. (S. Ct. *Rule* 19.) First of all, the Court of Appeals for the Third Circuit has interpreted 29 U.S.C. §623(f)(2), the retirement plan exemption of the ADEA, in a way which conflicts with decisions of the Fourth and Fifth Circuit Courts of Appeals[1] and which, if permitted to stand, would emasculate the protection which the Act was intended to provide for older workers. Secondly, the Third Circuit Court of Appeals in this case has decided an important question of federal law which has not been, but should be, settled by this court,

1. *McMann v. United ... Lines, Inc.*, 542 F.2d 217 (4th Cir. 1976); *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212 (5th Cir. 1974).

i.e., it has decided, contrary to the decisions of the majority of trial courts which have ruled on the question,[2] that damages for pain and suffering caused by illegal discrimination on grounds of age are not recoverable under the Act.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in concluding that EREC's forced retirement of Dr. Rogers at age 60 did not violate the ADEA—even though that discharge reflected arbitrary age discrimination—because Dr. Rogers was to receive substantial retirement benefits under an otherwise bona fide retirement plan?

2. Did the Court of Appeals err in concluding that "pain and suffering" damages are not available under the ADEA even though that law empowers courts to grant "legal" relief "without limitation"?

STATUTORY PROVISIONS INVOLVED

Section 623 of Title 29 of the United States Code provides, in pertinent part, as follows:

> (a) It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> • • •

2. *Combes v. Griffin Television, Inc.*, 421 F. Supp. 841 (W.D. Okla. 1976); *Bertrand v. Orkin Exterminating Co.*, 419 F. Supp. 1123 (N.D. Ill. 1976); *Murphy v. American Motors Sales Corp.*, 410 F. Supp. 1403 (N.D. Ga. 1976); *Rogers v. Exxon Corp.*, 404 F. Supp. 324 (D.N.J. 1975). But see *Platt v. Burroughs Corp.*, No. 76-1888 (E.D.Pa. Dec. 22, 1976); *Sant v. Mack Trucks, Inc.*, 13 FEP 854 (N.D. Cal. Sept. 24, 1976).

(f) It shall not be unlawful for an employer, employment agency, or labor organization—

• • •

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual;

• • •

Section 626 of Title 29 of the United States Code provides, in pertinent part, as follows:

• • •

(b) The provisions of this chapter shall be enforced in accordance with the powers, remedies and procedures provided in section 211(b), 216 (except for subsection (a) thereof), and 217 of this Title and subsection (c) of this section. Any act prohibited under section 623 of this Title shall be deemed to be a prohibited act under section 215 of this Title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be upaid minimum wages or unpaid overtime compensation for purposes of section 216 and 217 of this Title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirement of this chapter through informal methods of conciliation, conference and persuasion.

(c) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this chapter.

STATEMENT OF THE CASE

Dr. Dilworth T. ("Tom") Rogers worked as a research scientist for EREC from 1938 to 1969 (with an interruption of one year). EREC terminated his employment on September 1, 1969. Dr. Rogers was then sixty years old. EREC asserted that medical reasons—Dr. Rogers' sensitivity to the stresses imposed upon him by his employment—were the cause for his discharge. Dr. Rogers charged and the jury found that the true reason for the termination of his employment was his age and that the stresses to which he was subjected were the result of discriminatory treatment directed toward him because, according to EREC management, Dr. Rogers was too old to remain as a creative research scientist once he had reached his fifties.

The testimony at trial showed that EREC management believed, and acted on the belief, that young scientists were the most creative and that creativity diminished with age. A former executive vice president of EREC who had served in that capacity for fifteen years testified, "It's generally accepted that creative people are creative when they are young and are less motivated when they get older." This was true, he said, of older people in general and of research scientists specifically (A338; A342 [3]).

3. References to "A [number]" are to the appendix filed with the Court of Appeals. References to "E [number]" are to exhibits included within the appendix filed with the Court of Appeals.

An EREC management representative openly informed a group of employees that the future compensation of older employees would be less generous than previously so that more funds would be available for the compensation of new employees (A309a-10a). The official minutes of an EREC management group which had been organized to increase employee productivity recorded that the man who at the time of trial was president of the company had urged "that efforts be made to separate older ineffective-professionals and hire younger ones" and "to move the older ineffective non-professionals in order to retain the young effective ones." The same minutes recorded the recommendation of another company executive that the compulsory retirement age be decreased because "in general, the 60 to 65 year old group is not very productive" (E35).

EREC's treatment of Dr. Rogers was consistent with this perspective on aging and creativity. He was treated well during his younger years, but criticized and shunted aside during the later period. In 1951, at the age of 42, he was appointed EREC's first Senior Research Associate because of his "outstanding technical contribution." During his career, he received credit for fifty one patents, an achievement which ranked him seventeen among the thousands of EREC scientists (E13-14; A272a). For many years, he was sent to universities to recruit new scientists for EREC (A74a). Beginning approximately in 1959, however, when Dr. Rogers was fifty years old, he was no longer asked to do EREC's university recruiting (A74a; E275). After April 1961, he was not given a salary increase for seven years (E43). Although Dr. Rogers was among the most prolific of EREC scientists between 1962 and 1965 in writing patent memoranda and patent applications (which were approved and formally

submitted by a company review committee), and although he was granted seven patents in 1966 (E14; E269; A1199a-1200a), EREC management began to comment adversely on his productivity. He was told that the administrators considered him "cynical and not motivated" (A557a-58a; E270). Administrative memoranda noted that he was not a "hard worker" and that he had what was alleged to be a "cynical non-cooperative attitude" (A502a; E267-69a; E462-63). He was subjected to unsatisfactory working conditions and assigned to tasks inappropriate to his experience and accomplishments. In March 1967, EREC management scheduled a retirement health examination for Dr. Rogers without his knowing that the examination had anything to do with retirement (A937a-46a; E53; E181). EREC's medical director, Dr. Caldwell, became an active participant in management discussions relating to Dr. Rogers' productivity and possible retirement. In March 1967, Dr. Caldwell told Dr. Rogers' wife that management had recommended Dr. Rogers' retirement "based merely on age and length of service" (A79a). In October 1967, the EREC management group which had earlier recorded the suggestion that efforts be made to separate older ineffective professionals and hire younger ones, was told that Dr. Rogers was an "ineffective performer" and that efforts to "remotivate him" had proven futile; Dr. Rogers was identified in the minutes as a "marginal performer" for whom "separation is indicated" (A1350a-53; E23; E493). Significantly, however, neither then nor at any later time did EREC terminate Dr. Roger's employment on grounds of any alleged inadequacy of his performance. In January 1968, Dr. Caldwell asked Mrs. Rogers to urge her husband to retire, offering him financial inducements for doing so (A83a-84a).

By December 1967, management's adverse treatment and criticism of Dr. Rogers affected his health. Management continued to criticize his alleged lack of productiv-

ity, to complain about his alleged failure to do assigned work and, directly and indirectly, to suggest he take early retirement. He was directed to work in the laboratory although he had not done such work for twenty-five years. A back condition prevented his doing laboratory work and EREC's medical director admitted that such an assignment would be most unusual for a Senior Research Associate such as Dr. Rogers (A1010a-11a; A1016a-20a; E447; E499). Nonetheless, at a March 7, 1969 meeting, Dr. Alpert, who was then head of the division of EREC in which Dr. Rogers worked, criticized him for his poor performance rating, refused to believe that he was unable to do laboratory work, and insisted that he take the laboratory assignment (A717a; A737a-44a; A747-48a; E459-61).

Dr. Rogers went home from that meeting extremely upset. For several months afterward he suffered from gastrointestinal problems, headaches, skin rashes, insomnia and general anxiety—all caused by his situation at EREC (A753a; E322-23). He also continued to suffer from impotency, a condition he first contracted in 1967 when management criticism was especially severe (A1784a; A1790a-91a; E393). He was unable to work and Dr. Diefendorf, Dr. Rogers' personal physician, informed Dr. Caldwell on April 8, 1969 that it would be difficult for Dr. Rogers to return to work in any productive capacity in the foreseeable future (E322). On May 20, 1969, Dr. Diefendorf informed Dr. Caldwell that Dr. Rogers was "considerably improved" but should not yet return to work, "particularly in the same job as he had during this past year" (E325). In a report to Dr. Caldwell on June 16, 1969, Dr. Diefendorf again noted Dr. Rogers' improvement; Dr. Diefendorf added, however, that Dr. Rogers' recovery could not be complete until EREC made it clear that Dr. Rogers would not have to work under conditions similar to those of the recent past (E327).

On June 25, 1969, EREC's medical director, Dr. Caldwell, wrote to Dr. Alpert that Dr. Rogers' health would prevent him from returning to work (E343). Within two days, Dr. Alpert wrote to his superior, Dr. Swabb, recommending a medical retirement for Dr. Rogers. A copy of this recommendation was sent to Wade Smith, corporate counsel (E344). At trial, Dr. Alpert testified that his recommendation for medical retirement of Dr. Rogers was based not only on Dr. Caldwell's letter but also on a review of Dr. Rogers' entire personnel record, including performance evaluations. Dr. Alpert said he went through every evaluation, but disregarded all positive comments about Dr. Rogers' achievements. According to Dr. Alpert, he focused only on critical comments that had been made of Dr. Rogers from 1943 to 1969 (A1087a; A1092a; A1125-28; A1132a-39a; A1146-50a). Dr. Alpert said this review supported his recommendation for a medical retirement because the review led to the following major conclusion:

> . . . Dr. Rogers . . . was very difficult to get along with, had problems relating to other people, was frustrated because of lack of administrative advancement, . . . There was an additional conclusion; that his—it confirmed low-work productivity. The low-work productivity that I was observing on a current basis (A1088a).

Dr. Rogers' retirement was effective on September 1, 1969, even though his temporary disability benefits under the company plan did not expire until February 1970. Even though Dr. Rogers preferred to retain his status as an employee and get temporary benefits rather than retirement benefits (in the hope that he could eventually return to work), EREC management decided otherwise (E84-85).

At the trial, Dr. Diefendorf, Dr. Rogers' private physician, testified without contradiction that Dr. Rogers' work situation had caused him severe physical symptoms. In addition, Dr. Rogers endured great mental anguish. Dr. Rogers had previously been optimistic, cheerful and gregarious; he became discouraged, depressed and lacking in self-confidence as the result of his unfair treatment by EREC. Dr. Rogers felt keenly that his reputation as a scientist—the thing for which he had worked all his life —had been tarnished by his forced retirement (A1760a-61a; A1766a; A1773a-74a; A1792a).

A bifurcated trial was held before a jury in the District Court of New Jersey. On January 31, 1975, the jury found EREC liable for having violated the ADEA in its treatment of Dr. Rogers. The parties stipulated that Dr. Rogers' out-of-pocket losses amounted to $30,000. On February 4, 1975, the jury returned a verdict awarding Dr. Rogers $750,000 as compensation for pain and suffering. On May 16, 1975, the trial court denied EREC's post-trial motions on the condition that plaintiff consent to a remittitur of $550,000 of the "pain and suffering" award. The trial court also found that EREC's discriminatory actions towards Dr. Rogers were willful, and, pursuant to Section 626(b), 29 U.S.C. §626(b), doubled the $30,000 award for Dr. Rogers' out-of-pocket losses. (The trial court assumed that liquidated damages based on willfullness were *not* to include an amount equal to the award for "pain and suffering").

EREC appealed to the United States Court of Appeals for the Third Circuit alleging, *inter alia*, that EREC's retirement of Dr. Rogers was protected under the ADEA's exemption for bona fide retirement plans, that the ADEA did not allow "pain and suffering" damages, and that the trial court was precluded from finding EREC's actions willful because neither the Complaint nor the pretrial order explicitly referred to willfulness. Petitioners cross-appealed, alleging, *inter alia*, that the trial court erred in requiring a remittitur of $550,000 and in not including an amount equal to the "pain and suffering" award in calculating liquidated damages under Section 626(b). On January 20, 1977, the Court of Appeals issued an opinion reversing the trial court and remanding the case to the trial court for proceedings not inconsistent with the Court's opinion. In that opinion, the Court found (1) that EREC's retirement of Dr. Rogers was protected under Section 623(f)(2) of the ADEA, 29 U.S.C. §623(f)(2), because Dr. Rogers was to receive substantial retirement benefits, (2) that the ADEA does not allow for "pain and suffering" damages, and (3) that the trial court was precluded from making a finding of willfulness on EREC's part.

ARGUMENT

I. THE COURT IN THIS CASE SHOULD RESOLVE THE CONFLICTS AMONG THE THIRD, FOURTH AND FIFTH CIRCUIT COURTS OF APPEALS CONCERNING THE MEANING OF THE ADEA'S EXEMPTION FOR BONA FIDE RETIREMENT PLANS.

In this case, the Court of Appeals for the Third Circuit has interpreted the exemption clause of 29 U.S.C. §623(f)(2) in a way which emasculates the entire statute. That provision declares, in pertinent part:

> It shall not be unlawful for an employer . . . to observe the terms of a bona fide seniority system or any bona fide employee benefit plan . . . which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual. . . .

The Third Circuit construed that provision to mean that EREC could, with impunity, arbitrarily discharge an employee solely because of age if the discharged employee would receive substantial retirement benefits.

In effect, this holding converts a limited statutory exemption for bona fide retirement plans into a statutory authorization for employers to discriminate on the basis of age. Such a construction disregards the expressly declared purpose of Congress when enacting the ADEA "to promote employment of older persons" and "to prohibit arbitrary age discrimination in employment" (29 U.S.C. §621(b)). The Third Circuit's opinion in this case treats the ADEA as if it had been designed, not to protect employment, but to assure older persons a substantial retirement benefit after they have been arbitrarily discharged because of age. Such a construction also renders either meaningless or futile the other clause of Section 623(f)(2) which prohibits employers from refusing to hire persons solely because of their age.

This decision of the Third Circuit places it in conflict with decisions of the Courts of Appeals for two other Circuits. In *McMann v. United Air Lines, Inc.*, 542 F.2d 217 (4th Cir. 1976), *cert. granted*, 45 U.S.L.W. 3554 (1977), the Fourth Circuit concluded that an employer cannot invoke a retirement benefit plan to justify the discharge or retirement of an employee on the basis of age unless the employer's action is justified by some independent economic or business purpose other than arbitrary age discrimination. The Fourth Circuit recognized that the ADEA was explicitly concerned with employment, that Congress realized at the time of its enactment that millions of employees were covered by retirement plans like those of United Air Lines, and that it was unthinkable that Congress intended to exclude those millions of employees from the ADEA's protections. The Fourth Circuit decision thus emphasized the employment of older persons and not the scope of their retirement benefits.

The decision of the Third Circuit is also inconsistent with the decision of the Fifth Circuit Court of Appeals in *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212 (5th Cir. 1974). The Third Circuit held that the date of the retirement plan's adoption was irrelevant in deciding whether it was bona fide and therefore entitled to an exemption. The Fifth Circuit Court of Appeals in the *Brennan* case held that any plan adopted prior to the ADEA's enactment is automatically within the exemption. Furthermore, the *Brennan* court, unlike the Court of Appeals for the Third Circuit in the instant case, did not treat the amount of retirement benefits as relevant to whether a retirement fell within the exemption.

The issuance of a Writ of Certiorari in the *McMann* case does not eliminate the need for Supreme Court review of the instant case. In *McMann*, the facts were largely stipulated by the parties. It was agreed there,

for example, that the United Air Lines' retirement plan required the retirement of the plaintiff at age 60 and that the plaintiff was in fact 60; in other words, the employer in *McMann* exercised no control over the event which triggered the application of the retirement plan and, in that sense, the employer can be said to have implemented its retirement plan in a neutral fashion. Accordingly, the only legal issue presented to the Court in *McMann* was whether a retirement plan offering substantial benefits would fall within the ADEA's exemption if that plan were the sole justification for the employer's action. No issue was presented to the Court whether the employer had engaged in *other* acts of arbitrary age discrimination which discredit the legitimacy of the employer's action.

In contrast, the instant case raises a basic question whether the employer has taken actions which preclude its reliance on its retirement plan. That issue arose in the following context. EREC maintained throughout the trial and before the Third Circuit Court of Appeals that the *sole* basis for its forced retirement of Dr. Rogers was his medical condition. On this basis, EREC argued that, when it retired Dr. Rogers, it was simply observing the terms of its retirement plan. In view of its verdict, the jury found that EREC could not rely on that alleged medical disability, either because it was not a disability which justified retirement or because it was a product of EREC's own unlawful conduct in harassing and otherwise mistreating Dr. Rogers. The Third Circuit, however, said it didn't care; EREC's retirement was still lawful under the Section 623(f)(2) exemption. Under the Third Circuit's reasoning, an employer could lawfully adopt an age discrimination policy, use that policy to make an older employee work under intolerable conditions, and, after the employee had become sick, cite his illness as grounds for retirement.

Unlike *McMann*, then, the instant case tests the limits of the ADEA's retirement plan exemption; for here a jury has found that the employer's discriminatory conduct provided a bootstrap to enable the employer to invoke its retirement plan to justify the discharge of an employee. Even if this Court should reverse the Fourth Circuit in *McMann* and adopt the reasoning of *Brennan*, *supra*, that would not resolve the critical issue presented by the instant case for purposes of Section 623(f)(2): is an employer "observing" the terms of a bona fide retirement plan when the employer's own discriminatory conduct creates the *sole* basis for the employer's invocation of that retirement plan?

II. THIS COURT SHOULD RESOLVE THE IMPORTANT AND RECURRING FEDERAL QUESTION AS TO WHETHER THE ADEA ALLOWS FOR "PAIN AND SUFFERING" DAMAGES.

Supreme Court review is urgently needed to determine whether "pain and suffering" damages, as well as other forms of legal relief, are available under the ADEA. The trial court in the instant case held that such damages are available. In its opinion, the trial court pointed to the statutory language empowering courts to grant "legal or equitable relief . . . *without limitation* . . ." (29 U.S.C. §626(b) (emphasis added). See 29 U.S.C. §626 (c).) The trial court also pointed to the ADEA's legislative history and, in particular, to numerous statements by congressional representatives concerning the physical and mental suffering endured by victims of age discrimination.[4]

4. Representative Dwyer, for example, stated as follows:

> Men and women who, through no fault of their own, find themselves out of work and over 40 have been the forgotten people of our time. They have been victims of the myth that holds they are too settled, too hard to retrain, and have too little time left to make a valuable contribution to new employers. The facts are otherwise, however, and it is up to Congress to help relieve

(footnote continued)

The trial court's conclusion about the availability of "pain and suffering" awards is further confirmed by other elements of the legislative history which show that Congress explicitly rejected a proposal to limit a victim's monetary compensation to out-of-pocket losses. On February 1, 1967, Senator Javits introduced S.788, a bill prohibiting age discrimination. That bill confined the victim's pecuniary damages to "amounts . . . withheld from such employee . . ." (113 *Cong. Rec.* 2199 (1967).) Senator Yarborough subsequently introduced S.830, the Johnson Administration's bill (and the bill which, as amended, was ultimately signed into law by President Johnson). (113 *Cong. Rec.* 2467 (1967).) Unlike S.788, S.830 followed the administrative framework of the Securities Exchange Act and confined relief to the equitable remedies of cease and desist orders, reinstatement, and hiring, with back pay to be given in the discretion of the Secretary of Labor. In hearings before the Senate Committee on Labor and Public Welfare, Senator Javits intro-

(footnote continued)
the anxieties that beset millions of the middle-aged and eliminate the obstacles that stand in the way of full opportunity for all.

When a man or woman of 55, for instance, loses his job, he faces the prospect of long months of frustration, fear and insecurity as he searches for a new one. And the odds are heavily against his finding new employment similar in kind and pay to his former position—no matter how skilled and experienced and vigorous he may be. The cost of such an experience in terms of mental anguish, family suffering, lost income, and damaged self-respect is too hight o measure. One must observe it at firsthand—as I am confident many of our colleagues have—to appreciate how painful and how unnecessary it all is.

. . . [W]hen older applicants are, in fact, more capable and dependable . . . or when retraining and the acquisition of new skills is feasible . . . then job discrimination hurts not only the deprived applicants but the employers and our economy and society as well. This is especially true when discrimination consists of blunt, blind refusal, rigid and unbending, to employ workers once they have passed an arbitrary age, however able or qualified they may be. As we have seen, such a closed-door policy only adds to long-term unemployment, higher relief costs, and extensive human suffering and despair.

• • •

113 *Cong. Rec.* 34751-34752 (1967).

duced an amendment to S.830 which would have expressly confined an employee's monetary damages to lost compensation. (*Hearings on S. 830 and S. 788 before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess., p. 25 (1967). See 113 *Cong. Rec.* 7076 (1967).)

But the Senate Committee on Labor and Public Welfare, which reported S.830 to the Senate floor on November 6, 1967, rejected Senator Javits' proposal to limit the employer's monetary liability to the employee's pecuniary losses. (113 Cong. Rec. 31248-49 (1967).) Instead, the Committee adopted the language currently in force, providing that "Amounts owing to any individual as a result of a violation of this Act shall be *deemed* to be unpaid wages or unpaid overtime compensation . . ." (29 U.S.C. §626(b) (emphasis added).) The Committee also amended S.830 to expand the available relief to include *legal* remedies. By adopting this language, the Senate—fully aware of the more limited language in Title VII of the Civil Rights Act, 42 U.S.C. §2000e, and the Fair Labor Standards Act, 29 U.S.C. §§215-17—clearly intended to provide aggrieved persons with greater relief than that available to parties under Title VII or the Fair Labor Standards Act.[5]

Commentators who have reviewed the legislative history and resulting language have concluded that "pain and suffering" damages are available under the ADEA. (Note, "Damage Remedies Under the Age Discrimination in Employment Act," 43 *Brooklyn L. Rev.* 47 (1976); Note, "Compensatory Damages for Pain and Suffering Held Recoverable Under the Age Discrimination in Employment Act of 1967," 7 *Seton Hall L. Rev.* 642 (1976).)

5. Title VII explictly confines available relief to equitable remedies, which include back pay. (See *Van Hoomissen v. Xerox Corp.*, 368 F. Supp. 826, 835-36 (N.D. Cal. 1973).) The Fair Labor Standards Act confines available relief to lost wages and liquidated damages in an amount equal to lost wages. (See *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945).)

The Third Circuit nevertheless ignored the legislative history in holding that the ADEA does not allow awards for pain and suffering. Although the ADEA is explicitly concerned with the "terms" and "conditions" of employment as well as with the hiring and discharge of employees, and although the Act explicitly allows a court to provide "legal" relief "without limitation," the Third Circuit concluded that the purposes of the ADEA would not be served by allowing "pain and suffering" damages. The Third Circuit thus rewrote the statute to hold that an employee could get no more under the ADEA then he could get under Title VII or the Fair Labor Standards Act.

The Third Circuit's reasoning could lead to absurd results that were surely not intended by Congress. These absurd results are aptly illustrated by an example suggested by the trial court in considering EREC's argument that the ADEA did not allow for "pain and suffering" damages. If EREC's argument were correct, said the trial court, it would mean that an employer who wanted to arbitrarily discriminate against an employee solely because of age could place the employee in a basement office, make the employee work under intolerable conditions, and cause the employee severe illness without being required to compensate the harassed employee one penny for his pain and suffering; at worst, the employer would face a court order providing only for prospective injunctive relief—assuming that the victimized employee had the patience and resources to litigate his grievance. (A1675a. See A1681a-82a.)

The consequences envisioned by the trial court are not far-fetched. In the instant case, there was substantial evidence—which the jury obviously accepted—to demonstrate that EREC willfully harassed Dr. Rogers because of his age and that Dr. Rogers suffered greatly as a result of that discriminatory treatment. The Third Circuit attached no importance to these jury findings. The consequences of the Third Circuit's ruling could be severe. For if the Third Circuit's decision on "pain and suffering" damages is upheld, it would mean that an employer could use any device imaginable to cause an older employee substantial physical and mental harm. Even if the court found such behavior to be based on arbitrary age discrimination, the individual harmed would have no remedy at all if, when the litigation was completed, the employee was past the age of 65 or, as in Dr. Rogers' case, dead.

The question of the availability of "pain and suffering" damages, as well as of other forms of legal relief under the ADEA, is being raised with increasing frequency in lower courts. (*Platt v. Burroughs Corporation*, No. 76-1888 (E.D. Pa. December 22, 1976) ("pain and suffering" damages not available); *Combes v. Griffin Television, Inc.*, 421 F. Supp. 841 (W.D. Okla. 1976) ("pain and suffering" damages available); *Arritt v. Grisell*, 421 F. Supp. 800 (N.D. W. Va. 1976) (issue not decided); *Bertrand v. Orkin Exterminating Company*, 419 F. Supp. 1123 (N.D. Ill. 1976) ("pain and suffering" damages available); *Murphy v. American Motors Sales Corporation*, 410 F. Supp. 1403 (N.D. Ga. 1976) (punitive damages and other legal relief available); *Sant v. Mack Trucks, Inc.*, 13 FEP 854 (N.D. Cal. September 24, 1976) ("pain and suffering" damages not available).) Without guidance from this Court, parties and lower courts will continue to expend considerable resources in trying to resolve this legal issue with no guarantee of obtaining the correct result. The Supreme Court, therefore, should consider this vital issue at the same time it considers the ADEA's exemption for retirement plans.

CONCLUSION

WHEREFORE, in view of the foregoing, it is respectfully requested that the Supreme Court of the United States issue a Writ of Certiorari to the United States Court of Appeals for the Third Circuit to review the aforementioned issues.

Respectfully submitted,

/s/ Murry D. Brochin
MURRY D. BROCHIN

/s/ Lewis J. Paper
LEWIS J. PAPER
Attorneys for Petitioners

Of counsel:
LOWENSTEIN, SANDLER, BROCHIN,
KOHL & FISHER
744 Broad Street
Newark, New Jersey 07102
(201) 624-4600

APPENDIX A

Gladys E. ROGERS and Margaret Ann Rogers, as Co-Executrices of the Estate of Dilworth T. Rogers, Deceased, Plaintiffs,

v.

EXXON RESEARCH AND ENGINEERING COMPANY, a Delaware Corporation, Defendant.

Civ. A. No. 681-70.
United States District Court, D. New Jersey.

Nov. 5, 1975.

Former employee brought action against employer to recover for alleged age discrimination. After employee's death, coexecutrixes of the estate were substituted as plaintiffs. Following stipulation that out of pocket damages were $30,000, jury returned verdict in favor of the plaintiffs and awarded $750,000 for pain and suffering. The District Court, Stern, J., held that employee could recover for pain and suffering resulting from the age discrimination; that evidence sustained finding of pain and suffering resulting from the age discrimination; that evidence demonstrated that the discrimination was willful, thus permitting award of liquidated damages equal to the "amounts owing" to the employee; that the term "amounts owing" referred only to out of pocket pecuniary losses; and that award of $750,000 for pain and suffering was excessive to the extent that it exceeded $200,000.

Order accordingly.

1. Labor Relations Key 7

Age Discrimination in Employment Act essentially establishes a new statutory tort; once liability is established

under the statute, the panoply of usual tort remedies is available to recompense injured parties for all provable damages. Ages Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

2. Action Key 3

The existence of a statutory right implies the existence of all necessary and appropriate remedies.

3. Labor Relations Key 7

Age Discrimination in Employment Act's remedial purpose should be liberally effectuated by the district court in fashioning appropriate relief. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

4. Labor Relations Key 7

In measuring the wrong done in ascertaining the appropriate remedy for violation of Age Discrimination in Employment Act, the most pernicious effect is not to the pocket book, but to the victim's self-respect. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

5. Labor Relations Key 7

Evidence that employee, who had a doctorate in chemistry, was a leader in his field, and that, following termination of his employment at age 60, he experienced a syndrome of severe abdominal pain, vomiting, and impotency, all of which were the result of his employer's illegal age discrimination was sufficient to permit the employee to recover for pain and suffering inflicted by the age discrimination. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

6. Labor Relations Key 7

Award to person who has been discriminated against in employment on the basis of age for pain and suffering is not punitive in purpose but is designed solely to effect full and adequate compensation for all injuries sustained as a result of the unlawful and tortious conduct. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

7. Federal Civil Procedure Key 2737.5

Age Discrimination in Employment Act incorporates certain enforcement provisions of the Fair Labor Standards Act and thus permits award of reasonable attorney's fee to party who is successful in pursuing action under the Act. Age Discrimination in Employment Act of 1967, § 7(b), 29 U.S.C.A. § 626(b); Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C.A. § 216(b).

8. Labor Relations Key 7

Issue of willfulness of violation of Age Discrimination in Employment Act is for the court and not for the jury. Age Discrimination in Employment Act of 1967, §§ 2 et seq., 7(b), 29 U.S.C.A. §§ 621 et seq., 626(b).

9. Labor Relations Key 7

For purposes of provision of Age Discrimination in Employment Act permitting an award of liquidated damages if violation of the act was willful, the term "willful" must be construed in a civil sense; it applies to violations which are intentional, knowing or voluntary as distinguished from accidental and is used to characterize conduct marked by careless disregard of whether one has the right to so act. Age Discrimination in Employment Act of 1967, § 7(b),

29 U.S.C.A. § 626(b); Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C.A. § 216(b).

10. Labor Relations Key 7

Testimony of wife of employee who was victim of age discrimination concerning her conversations with employer's agents and evidence of self-serving memorandum prepared by one of the agents demonstrated that the employer's illegal conduct in discharging the employee because of age was willful, thus permitting an award of liquidated damages in an amount equal to the amounts owing the employee. Age Discrimination in Employment Act of 1967, § 7(b), 29 U.S.C.A. § 626(b); Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C.A. § 216(b).

11. Labor Relations Key 7

"Amounts owing," the amount used to determine award of liquidated damages where violation of Age Discrimination in Employment Act has been willful, refers only to out of pocket pecuniary loss and does not include any amounts which may be awarded for mental pain and suffering. Age Discrimination in Employment Act of 1967, § 7(b), 29 U.S.C.A. § 626(b); Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C.A. § 216(b).

See publication Words and Phrases for other judicial constructions and definitions.

12. Federal Civil Procedure Key 2608

Standard of proof on motion for judgment n. o. v. is like that for a motion for a directed verdict; the appropriate test is whether, when all the evidence is viewed most favorably to the nonmoving party and all reasonable inferences are drawn in its favor, the court determines that there is not sufficient evidence upon which the jury could properly

have found for the nonmoving party. Fed.Rules Civ.Proc. rule 50(b), 28 U.S.C.A.

13. Labor Relations Key 7

Evidence, including testimony by wife of employee who was discriminated against and memoranda written by one of employer's agents, sustained jury finding that employer had discriminated against employee by discharging him because of his age and that pain and suffering had been inflicted on the employee as a result of the discrimination. Age Discrimination in Employment Act of 1967, §2 et seq., 29 U.S.C.A. §621 et seq.

14. Federal Civil Procedure Key 2369

Once a motion for judgment n. o. v. is denied, an alternative motion for new trial is to be considered as if it had been made independently. Fed.Rules Civ.Proc. rule 59, 28 U.S.C.A.

15. Federal Civil Procedure Key 2338

Where trial has been long, complicated and remote from the ordinary juror's experience, the trial court should look more closely at the verdict in ruling on motion for new trial than it might where the issues were essentially those of credibility. Fed.Rules Civ.Proc. rule 59, 28 U.S.C.A.

16. Federal Civil Procedure Key 2338

Only if court finds the jury mistaken and its verdict clearly wrong, although supported by some evidence, can a new trial be granted. Fed.Rules Civ.Proc. rule 59, 28 U.S.C.A.

17. Federal Civil Procedure Key 2343

Standard for determining whether to award new trial on issue of damages is whether the court finds the jury's award shocking, unfair or biased.

18. Labor Relations Key 7

Award of $750,000 for pain and suffering to an employee who was discharged as result of age discrimination on the part of the employer was excessive to the extent that it exceeded $200,000. Age Discrimination in Employment Act of 1967, §2 et seq., 29 U.S.C.A. §621 et seq.

Lowenstein, Sandler, Brochin, Kohl & Fisher by Murry D. Brochin, Charles R. Church, Newark, N. J., for plaintiffs.

Carpenter, Bennett & Morrissey by Thomas L. Morrissey, and Virginia D. Fenton, Newark, N. J., for defendant.

OPINION

STERN, District Judge.

This action brought under the Age Discrimination in Employment Act of 1967 (ADEA), Title 29 U.S.C. §621 *et seq.*, was commenced as *Dr. Dilworth T. Rogers v. Esso Research and Engineering Company*. After his death, Dr. Rogers' wife and daughter were named co-executrices of his estate on June 11, 1973, and were substituted as plaintiffs. The caption was amended to reflect the defendant's corporate name change on June 14, 1974.

Trial with a jury was moved before this Court on January 14, 1975. There was no dispute that defendant Exxon had forced Dr. Rogers to take early retirement at the age of 60. The question was the reason for defendant's action. Plaintiffs maintained that Dr. Rogers was retired early because of his age, while defendant contended that Dr. Rogers was retired because of medical disability, principally caused by mental instability. The trial was bifurcated, and the jury returned a verdict on the issue of liability in favor of plaintiffs on January 31, 1975. Counsel stipulated plaintiffs' out-of-pocket compensatory damages at $30,000, and the subsequent trial on the issue of damages was limited to the question of damages for the pain and suffering inflicted on plaintiffs' decedent by the defendant's unlawful conduct. On February 4, 1975, the jury returned a verdict setting the amount of compensation for pain and suffering at $750,000. Judgment in the amount of $780,000 was entered in favor of plaintiffs on February 18, 1975.

On February 14, 1975, plaintiffs moved to fix the amount of attorneys' fees to be awarded them, and "to double the amount of damages as determined by stipulation of counsel and the verdict of the jury," pursuant to Title 29 U.S.C. §§626(b) and 216(b). After extensive briefing and argument of the issue, the latter part of the motion, which was in fact an application for liquidated damages, was granted with regard to the stipulated $30,000 out-of-pocket damages but denied with regard to the $750,000 damages for pain and suffering, on May 16, 1975.

On March 3, 1975, defendant moved for judgment of no cause of action notwithstanding the verdict, or in the alternative for a new trial. On May 16, 1975, the Court denied the motion for judgment notwithstanding the verdict, and denied the motion for a new trial on the condition that plaintiffs consent to a remittitur of $550,000. Plaintiffs consented to the remittitur by letter to the Court dated May 20, 1975. The Court awarded attorneys fees, and the sum of $65,000 was fixed by consent of counsel on May 30, 1975.

This opinion deals with the Court's reasons for several of the rulings made in this case. The first section concerns the Court's finding that an action for compensatory damages

for pain and suffering lies under this Act. In the second portion, the Court considers the attorneys' fees and liquidated damages provisions of the Age Discrimination in Employment Act, which incorporate certain sections of the Fair Labor Standards Act. Finally, the Court discusses the motions for judgment notwithstanding the verdict and for a new trial.

I. COMPENSATORY DAMAGES FOR PAIN AND SUFFERING

After the jury returned its verdict on the issue of liability, the Court ruled that plaintiffs were entitled to demonstrate damages for pain and suffering inflicted on plaintiffs' decedent by the unlawful actions of defendant Exxon. (Tr. 1/31/74: 2111-2112). In the course of deciding the motion for liquidated damages, on May 16, 1975, the Court reiterated that ruling. (Tr. 5/17/75: 32-33)

[1] It is the Court's view that the ADEA essentially establishes a new statutory tort. Once liability is established under the statute, therefore, the panoply of usual tort remedies is available to recompense injured parties for all provable damages. As the Supreme Court held in the context of Title VIII of the Civil Rights Act of 1968, as amended, Title 42 U.S.C. §3612, a statute proscribing racial discrimination in housing:

> A damages action under the statute sounds basically in tort—the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendants' wrongful breach. As one Court of Appeals noted, this cause of action is analogous to a number of tort actions recognized at common law.

Curtis v. Loether, 415 U.S. 189, 195, 94 S.Ct. 1005, 1009, 39 L.Ed.2d 260 (1974) (footnote omitted.)[1] The Supreme

1. The Court observed in a footnote:
An action to redress racial discrimination may also be likened to an action for defamation or intentional infliction of mental distress. Indeed, the contours of the latter tort are still developing, and it has been suggested that "under the logic of the common law development of a law of insult and indignity, racial discrimination might be treated as a dignitary tort." C. Gregory and H. Kalven, Cases and Materials on Torts 961 (2nd ed. 1969).
415 U.S. at 195-196, n. 10, 94 S.Ct. at 1009.

Court has also held that other civil rights statutes "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Pierson v. Ray*, 386 U.S. 547, 556, 87 S.Ct. 1213, 1219, 18 L.Ed.2d 288 (1967); *Monroe v. Pape*, 365 U.S. 167, 187, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) (Title 42 U.S.C. §1983); *cf. Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 517 F.2d 1141, 1143 (4th Cir. 1975) (Title 42 U.S.C. §1982). *See Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 238-240, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969) (Title 42 U.S.C. §§1981-1982), *and Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-421, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975) (Title 42 U.S.C. §2000e *et seq.*).

[2] It is well-established that "the existence of a statutory right implies the existence of all necessary and appropriate remedies." *Sullivan v. Little Hunting Park, Inc.*, *supra*, 396 U.S. at 239, 90 S.Ct. at 405. The Court held in *Bell v. Hood*, 327 U.S. 678, 684, 66 S.Ct. 773, 777, 90 L.Ed.2d 939 (1946):

> [W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.

(footnotes omitted)

The Age Discrimination in Employment Act of 1967 may profitably be compared with Title VII of the Civil Rights Act of 1964, in both purpose and scope. As the Court observed in *Hodgson v. First Federal Savings & Loan Ass'n*, 455 F.2d 818, 820 (5th Cir. 1972), "[w]ith a few minor exceptions the prohibitions of this enactment are in terms identical to those of Title VII of the Civil Rights Act of 1964 except that 'age' has been substituted for 'race, color, religion, sex or national origin.'" (footnote omitted) *Accord, Laugesen v. Anaconda Co.*, 510 F.2d 307, 311 (6th Cir. 1975). *See, e.g., Hodgson v. Tamiami Trail Tours*, 4 EPD ¶ 7795 (S.D. Fla. 1972). Thus "analogies to Title VII cases are often helpful in age discrimination cases." *Schulz v. Hickok Manufacturing Co., Inc.*, 358 F. Supp. 1208, 1212, n. (N.D. Ga. 1973), *See* 113 Cong.Rec. 34742 (90th Cong., 1st Sess.) (remarks of Rep. Matsunaga); Levien, "The Age Discrimination in Employment Act: Statutory Requirements and Recent Developments," 13 *Duq. L. Rev.* 227, 247 (1974). In its most recent analysis of Title VII remedies, the Supreme Court held that Congress intended for that statute "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co. v. Moody, supra*, 422 U.S. at 418, 95 S.Ct. at 2372. The Court continued:

. . . . . .

> Title VII deals with legal injuries of an economic character occasioned by racial or other anti-minority discrimination. . . . Where racial discrimination is concerned, "the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154 [85 S.Ct. 817, 822, 13 L.Ed.2d 709]. And where a legal injury is of an economic character,
>
> > "[t]he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed as near as may be, in the situation he would have occupied if the wrong had not been committed." *Wicker v. Hoppock*, 6 Wall. 94, at 99 [18 L.Ed. 752].
>
> The "make whole" purpose of Title VII is made evident by the legislative history. . . .

Id.

The cases which have examined the purpose and legislative history of the ADEA, although relatively few, agree that the Act shares Title VII's "make whole" purpose.

[3] In *Brennan v. Paragon Employment Agency, Inc.*, 356 F. Supp. 286, 288 (S.D.N.Y. 1973), *aff'd mem.*, 489 F.2d 752 (2d Cir. 1974), Judge Knapp wrote:

> The Act was intended to alleviate the serious economic *and psychological* suffering of people between the ages of 40 and 65 caused by wide-spread job discrimination against them. See §§621, 631 of the Act, 1967 U.S. Code Cong. & Admin. News, p. 2213, Cong. Rec. Nov. 6, Dec. 4, 1967.

(Emphasis added)

It is important to note, as the Eighth Circuit has recognized, that the ADEA's remedial purpose should be liberally effectuated by the district court in fashioning appropriate relief:

> We note that the Age Discrimination in Employment Act of 1967 is remedial in nature. *See* 29 U.S.C. §621;

> 1967 U.S. Code Cong. & Admin. News p. 2214. It prohibits a particularly subtle form of discrimination, and the courts must be receptive to its purposes and accord it the intended scope.

Surrisi v. Conwed Corp., 510 F.2d 1088, 1090 (8th Cir. 1975). *Cf. Blankenship v. Ralston Purina Co.*, 62 F.R.D. 35, 38 (N.D. Ga. 1973); *Woodford v. Kinney Shoe Corp.*, 369 F. Supp. 911 (N.D. Ga. 1973).

[4] In measuring the wrong done and ascertaining the appropriate remedy here, the Court is aware that the most pernicious effect of age discrimination is not to the pocketbook, but to the victim's self-respect. As in this case, the out-of-pocket loss occasioned by such discrimination is often negligible in comparison to the physiological and psychological damage caused by the employer's unlawful conduct. Various factors may combine to mitigate the victim's out-of-pocket loss. The older worker may have been contributing to a pension fund during his many years of employment, and may receive benefits when he retires. The worker who is illegally discharged because of his age is often a capable and productive employee; indeed, Congress' recognition of this fact is the foundation of the statute. Such a worker may well succeed in the difficult task of finding new employment, which, though perhaps not equal to what was lost, may reduce his out-of-pocket compensatory award still further.

[5] In the instant case, for example, there was testimony that plaintiffs' decedent was a scientist and inventor of recognized merit, and the developer of 51 patents. (Tr. 268-269) He lived for approximately three and one-half years after his forced retirement from defendant's employ. Despite his professional standing and the several additional years he could have worked at Exxon, however, Dr.

Rogers' stipulated out-of-pocket loss was only $30,000, because of certain pension benefits claimed by Exxon and acknowledged by plaintiffs as legitimate set-offs.

The record of this case emply demonstrates that the real loss Dr. Rogers suffered by elsewhere. It is difficult enough for anyone to encounter and to surmount the psychological and physiological problems of the aging process. Simultaneously to find oneself arbitrarily discharged because the clock has struck a certain hour adds substantially, as the evidence demonstrated here, to these already formidable stresses. The cumulative effect of an arbitrary and illegal termination of a useful and productive older employee is a cruel blow to the dignity and self-respect of one who has devoted his life to productive work, and can take a dramatic toll.

Dr. Rogers was the holder of Bachelor and Master of Science degrees from the Renssalaer Polytechnic Institute, and another Master's degree and a Ph.D. degree from Harvard University. He may fairly be termed a leader in his field, having served as president of both the Renssalaer Polytechnic Institute Association of Chemists and Chemical Engineers and of the Harvard Association of Chemists. His civic activities also included service as alumni advisor to Renssalaer Polytechnic Institute, and as an officer of the Loyalty Fund committees at Trinity College and Duke University. He was the first employee to attain the position of Senior Research Associate in the Products Research Division of defendant Exxon (Tr. 245), and from time to time traveled to various universities to recruit new technical personnel on the company's behalf. (Tr. 88-93)

[6] Dr. Rogers had been employed by defendant Exxon, except for a one-year lapse, since 1938. The jury found,

and the evidence supports its finding, that Dr. Rogers was unlawfully terminated because of his age. Such conduct by an employer toward an older worker has predictable consequences in terms of the victim's physical and emotional well-being. Dr. Rogers, for example, experienced a syndrome of severe abdominal pain, vomiting and impotency, all of which were clearly and persuasively demonstrated by the medical and lay testimony in this case to have been the proximate result of defendant's illegal discrimination.[2] This damage, of course, is wholly uncompensated by the stipulated out-of-pocket award. It can be compensated only by permitting the award of damages for pain and suffering. Such an award is not punitive in purpose, but is designed solely to effect full and adequate compensation for all injuries sustained as a result of the unlawful and tortious conduct. The specific question of the relief available under the statute is, of course, within the equitable discretion of the district court. *Brennan v. Ace Hardware Corp.*, 495 F.2d 368, 373 (8th Cir. 1974). A thorough examination of the legislative history confirms the Court's view that the Congressional purpose mandates an

2. According to the testimony of Dr. Diefendorf, Dr. Rogers' personal physician, plaintiffs' decedent suffered from the following work-related physical conditions caused by nervous disturbance: indigestion, heartburn, bloating, nausea, insomnia, lightheadedness, lack of ambition, fatigue, depression, impotency, and an itching skin rash called cholinergic urticaria, a type of hives. (Tr. 2169-2171) On at least one occasion, Dr. Diefendorf prescribed five milligrams of Valium, a mild tranquilizer, to be taken three times a day. (Tr. 2171) Dr. Rogers was also apparently afraid to drive because of "his feelings of uncertainty," (Tr. 2169), and his distrust of the dependability of his own reactions. (Tr. 2173) Dr. Diefendorf testified that Dr. Rogers' physical symptoms worsened when his work situation deteriorated. (Tr. 2173) Similarly, certain symptoms ameliorated after his retirement. For example, on March 28, 1969, Dr. Rogers' pulse rate was measured at 120 (Tr. 2179), a factor which "is often a sign of tension and anxiety." (Tr. 2173) That rate "quieted" to 84 in November 1969, two months after the official involuntary retirement and more than seven months after Dr. Rogers' last day of work, March 7, 1969. (Tr. 2179) Dr. Diefendorf testified that Dr. Rogers' symptoms were "a classical picture of an anxiety reaction or a nervous disturbance . . ." (Tr. 2181-2182)

award of compensatory damages for pain and suffering, upon an appropriate factual showing.[3]

3. The purpose of the ADEA was summarized in the remarks of Senators Javits and Young (Ohio) during that body's debate on the bill:

Senator Javits:

> Mr. President, it as a sad day indeed when a man realizes that the world has begun to pass him by . . . . But it is surely a much greater tragedy for a man to be told, arbitrarily, that the world has passed him by, merely because he was born in a certain year or earlier, when he still has the mental and physical capacity to participate in it as energetically and vigorously as anyone else.

113 Cong. Rec. 31254 (1967).

Senator Young:

> I long have felt it is a particular tragedy to amputate a human being's function, to strip productive persons of their skills, cheating them of the dignity of continued self-support. These are the consequences of forced retirement. It squeezes useful, healthy people out of the mainstream of society into a drab tributary on its fringe.

Id. at 31256.

As pointed out by several members during the House debate, the Act was designed to protect older workers from more than the purely economic effects of job discrimination on the basis of age. President Johnson recognized, in recommending the ADEA to the Congress in his Older American message of January 23, 1967, that "the greater loss is the cruel sacrifice in happiness and wellbeing which joblessness imposes on these citizens and their families." 113 Cong. Rec. 34744 (remarks of Rep. Kelly). Congress was clearly aware of the paradox of modern medicine's extension of the human life span and modern industry's relegation of those newly-found years to depressing inactivity, rather than productive and meaningful work. *See* 113 Cong. Rec. 34744 (remarks of Rep. Pucinski).

The full scope of the evil against which Congress sought to legislate was aptly stated by Rep. Eilberg during the House debate:

> Barred from productive work because of age discrimination, many people are forced to retire at the earliest possible moment, usually at substantially reduced retirement incomes. Suffering over increasingly longer periods of life with smaller pensions is a tragedy which need not happen, if early retirees had opportunities for employment open to them on the basis of their capabilities, rather than closed on account of their age.
>
> The financial and social costs, of course, are nothing compared with the costs in terms of human suffering and welfare which come about as the result of discriminatory practices in employment because of age. Employment plays a very important role in the makeup of the modern American and this role cannot be measured in the dollars he carries home on payday. Self-esteem, self-satisfaction, and personal security are important by-products of employment in industrial America. To deny a person the opportunity to compete for jobs because of unfounded age prejudice, is a most vicious, cruel, and disastrous form of inhumanity.
>
> The bill before the House is, of course, no panacea. By itself, this legislation cannot compel men to change their attitudes or ignore their prejudices. But this piece of legislation will help to focus attention upon a very serious problem. At the same time, the bill contains very real and effective tools with which to launch new educational and persuasive programs designed to eradicate discriminatory practices in employment. And,

The suitability of compensatory awards for pain and suffering has been recognized in other discrimination contexts, although the Court has found no reported case authorizing such an award under the Age Discrimination in Employment Act of 1967.

In *Humphrey v. Southwestern Portland Cement Co.*, 369 F. Supp. 832, 833-835 (W.D. Tex. 1973), *rev'd on other*

---

where these tools fail, the bill provides machinery to enable governments and agencies to prevent practices which cannot be otherwise overturned. The success, or failure, of this legislation will, in the end, depend upon coordinated efforts by Government, employers, unions, educational institutions, and private interested agencies and parties.

113 Cong. Rec. at 34745.

In his remarks Rep. Pepper made reference to a report of the American Medical Association, which found that although "[i]t is difficult to prove that physical or mental illness can be directly caused by denial of employment opportunities . . . few physicians deny that such a relationship exists." 113 Cong. Rec. at 34751.

Immediately before the House overwhelmingly passed the bill which became the ADEA, Rep. Dwyer identified the psychological ills the statute would combat:

> Men and women who, through no fault of their own, find themselves out of work and over 40 have been the forgotten people of our time. They have been victims of the myth that holds they are too settled, too hard to retrain, and have too little time left to make valuable contributions to new employers. The facts are otherwise, however, and it is up to Congress to help relieve the anxieties that beset millions of the middle-aged and eliminate the obstacles that stand in the way of full opportunity for all.
>
> When a man or woman of 55, for instance, loses his job, he faces the prospect of long months of *frustration, fear,* and *insecurity* as he searches for a new one. And the odds are heavily against his finding new employment similar in kind and pay to his former position—no matter how skilled and experienced and vigorous he may be. The cost of such an experience in terms of *mental anguish,* family *suffering,* lost income, and damaged self-respect is too high to measure. One must observe it at firsthand—as I am confident many of our colleagues have—to appreciate how *painful* and how unnecessary it all is.
>
> • • •
>
> . . . [W]hen older applicants are, in fact, more capable and dependable . . . or when retraining and the acquisition of new skills is feasible . . . then job discrimination hurts not only the deprived applicants but the employers and our economy and society as well.
>
> This is especially true when discrimination consists of the blunt, blind refusal, rigid and unbending, to employ workers once they have passed an arbitrary age, however able or qualified they may be. As we have seen, such a closed-door policy only adds to long-term unemployment, higher relief costs, and *extensive human suffering and despair.*

113 Cong.Rec. at 34751-34752. (Emphasis added)

grounds, 488 F.2d 691 (5th Cir. 1974), *rehearing denied,* 490 F.2d 992 (5th Cir. 1974), the Court awarded $1200 in damages for "psychic injuries" under Title VII. The Court held "that the purpose of the Act will best be served if all of the injuries which are caused by discrimination are entitled to recognition." 369 F. Supp. at 835. Once a plaintiff has established unlawful discrimination, "the remedies available . . . should be effective and complete." *Id.*

The *Humphrey* court persuasively summarized the characteristics of discrimination which require the availability of damages for mental distress to provide complete relief to an injured plaintiff:

> Evidence of mental distress was received. That distress is not unknown when discrimination has occurred. See, for example, *Chance v. Frank's Beauty Salon,* 35 A.D.2d 304, 316 N.Y.S.2d 236 (1970) noted in 35 Albany L.Rev. 782 (1970); *Massachusetts Commission Against Discrimination v. Franzaroli,* 357 Mass. 112, 256 N.E.2d 311 (1970) noted in 49 N.C.L.Rev. 221 (1970), and *Commission on Human Rights v. Knox Realty Co.,* 56 Misc.2d 806, 290 N.Y.S.2d 633 (1968). But as the trial progressed it became more apparent that the psychic harm which might accompany an act of discrimination might be greater than would first appear. For the loss of a job because of discrimination means more than the loss of just a wage. It means the loss of a chance to learn. Discrimination is a vicious act. It may destroy hope and any trace of self-respect. That, and not the loss of pay, is perhaps the injury which is felt the most and the one which is the greatest.

369 F. Supp. at 834.

Several courts of appeals have found compensatory damages for emotional distress and humiliation an appropriate

remedy for discrimination in housing in violation of Title 42 U.S.C. §§ 3604, 3612 and 1982. *Williams v. Matthews Co.*, 499 F.2d 819, 829 (8th Cir. 1974), *cert. denied* 419 U.S. 1021, 1027, 95 S. Ct. 495, 42 L.Ed.2d 294 (1974); *Jeanty v. McKey & Poague, Inc.*, 496 F.2d 1119 (7th Cir. 1974); *Seaton v. Sky Realty Co., Inc.*, 491 F.2d 634, 636 (7th Cir. 1974); *Steele v. Title Realty Co.*, 478 F.2d 380, 384 (10th Cir. 1973); *Smith v. Sol D. Adler Realty Co.*, 436 F.2d 344 (7th Cir. 1970). District courts in those circuits and elsewhere have concurred. *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 367 F. Supp. 860, 864 (D. Md. 1973)) (on remand from United States Supreme Court), *rev'd on other grounds*, 517 F.2d 1154 (4th Cir. 1975); *Hughes v. Dyer*, 378 F.Supp. 1305, 1310 (W.D. Mo. 1974); *Gonzales v. Fairfax-Brewster School, Inc.*, 363 F. Supp. 1200, 1205 (E.D. Va. 1973) (§ 1981—private school segregation). *See e.g., Rhoads v. Horvat*, 270 F. Supp. 307 (D. Colo. 1967); *Sexton v. Gibbs*, 327 F. Supp. 134 N.D. Tex. 1970), *aff'd* 446 F.2d 904 (5th Cir. 1971) (§ 1983—suits for illegal arrest); *Donovan v. Reinbold*, 433 F.2d 738 (9th Cir. 1970) (§ 1983—suit for intentional tort of dismissal from public employment for exercise of first amendment rights); *Richardson v. Communications Workers of America*, 443 F.2d 974 (8th Cir. 1971) (union's discrimination against non-union employee).

The availability of compensatory damages for pain and suffering finds further support in the literature. *See* Comment, "Implying Punitive Damages in Employment Discrimination Cases," 9 *Harv.Civ.Rights-Civ.Lib.L.Rev.* 325, 367-369 (1974); Duda, "Damages for Mental Suffering in Discrimination Cases," 15 *Clev.-Mar.L.Rev.* 1 (1966). *See also* Note, "Age Discrimination in Employment: The Problem of the Worker Over Sixty-Five." 5 *Rutgers-Camden L.J.* 484, 493 (1974).

Such damages have also been awarded by several state courts in appropriate discrimination cases. *See, e.g., Zahorian v. Russell Fitt Real Estate Agency*, 62 N.J. 399, 412-416, 301 A.2d 754, 762 (1973), and the New York, Massachusetts and Oregon cases cited therein. Resort to both state and federal law for remedies for the violation of federal rights has been expressly approved by the Supreme Court:

> Compensatory damages for deprivation of a federal right are governed by federal standards, as provided by Congress in 42 U.S.C. § 1988 . . . .
>
> > This means, as we read § 1988, that both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes. *Cf. Brazier v. Cherry*, [5 Cir.] 293 F.2d 401. The rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired.
>
> *Sullivan v. Little Hunting Park, Inc., supra*, 396 U.S. at 239-240, 90 S. Ct. at 406 (1969).

Those authorities which have rejected the award of compensatory damages for pain and suffering in discrimination cases have ruled solely on statutory grounds inapplicable to the ADEA. For example, such awards have been denied in Title VII cases on the theory that relief under that statute is limited to "equitable relief in the form of restitution," and that damages for pain and suffering are accordingly foreclosed. *Bradshaw v. Zoological Society*, 10 FEP Cases 1268 (S.D. Cal. 1975), citing *EEOC v. Detroit Edison*, 515 F.2d 301 (6th Cir. 1975). *Accord, Jiron v. Sperry-Rand Corp.*, 10 FEP Cases, 730, 739 (D. Utah 1975). *See* Comment, "Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964," 84 *Harv.L.Rev.* 1109, 1259-1261 (1971).

Title VII is distinguishable from the ADEA in this regard, and the Court is not limited to equitable remedies under this Act. Title 29 U.S.C. §§ 626(b) and (c) provide that the district court may grant "such legal or equitable relief as will effectuate the purposes of this chapter." Section 626(b) continues with an enumeration of various types of appropriate relief, in which damages for pain and suffering are not included. However, Congress expressly provided that its enumeration of remedies was not exclusive, with the language "including without limitation." *Cf. Curtis v. Loether, supra,* 415 U.S. at 197, 94 S. Ct. 1005, a discussion of the distinction between the action for damages authorized by the Fair Housing Act, as amended in 1968, and the equitable relief authorized by Title VII, as amended in 1972.

In summary, it is the opinion of the Court that the ADEA creates a statutory tort, and empowers the Court to employ a wide range of legal and equitable remedies in the exercise of the broad remedial discretion normally associated with actions arising from intentional torts. The Congressional history and cases decided under this and analogous civil rights statutes clearly contemplate redress of the emotional and psychological injury proved in this case by the relief awarded by the jury. The verdict of the jury, as remitted by plaintiffs on the motion for a new trial, will stand.

II. LIQUIDATED DAMAGES

Title 29 U.S.C. § 626(b) provides as follows:

> (b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts

> owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided,* That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

[7] It is clear from this section that the ADEA incorporates the cited enforcement provisions of the Fair Labor Standards Act, here particularly Title 29 U.S.C. § 216(b).[4]

4. Title 29 U.S.C. § 216(b) provides as follows:

> (b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which

LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286, 287-289 (5th Cir. 1975); *Hodgson v. First Federal Savings & Loan, supra*, at 820; *Brennan v. Ace Hardware Corp., supra*, at 373-374; *Monroe v. Penn-Dixie Cement Corp.*, 335 F. Supp. 231, 234-235 (N.D. Ga. 1971). Therefore, "a reasonable attorney's fee" must be awarded plaintiffs. *Brennan v. Ace Hardware Corp., supra; Schulz v. Hickok Manufacturing Co., Inc., supra*, at 1217; *Monroe v. Penn-Dixie Cement Corp., supra*, at 235-236. The Court is aware of the contrary view expressed without explanation in *Stringfellow v. Monsanto Co.*, 320 F. Supp. 1175, 1181 (W.D. Ark. 1970), but feels compelled to reject it. Since the award of attorney's fees is specifically authorized by § 216(b), the Supreme Court's recent decision in *Alyeska Pipeline Service Co. v. The Wilderness Society*, 421 U.S. 240, 95 S. Ct. 1612, 44 L.Ed.2d 141 (1975) is no bar to that award here. *Alyeska Pipeline, supra*, at 257-258 and n. 33, 95 S. Ct. 1612.

[8, 9] In addition, "amounts owing" as a result of a violation of the ADEA are subject to an equal award of liquidated damages, under § 216(b), provided that the violation was "willful." The issue of willfulness is for the Court and not the jury, and after the Court indicated its view in that regard, counsel so stipulated at trial. (Tr. 2112-2114; Tr. 5/16/75: 29-30) *See Chilton v. National Cash Register Co.*, 370 F. Supp. 660, 666 (S.D. Ohio 1974). The definition of "willful" to be applied in this context was aptly stated by Judge Middlebrooks in a Fair Labor Standards Act case:

> [T]he term "willful" . . . must be construed in the civil sense. It therefore applies to violations which are intentional, knowing or voluntary as distinguished from

restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection.

> accidental and it is used to characterize conduct marked by careless disregard whether or not one has the right so to act. *United States v. Illinois Central Ry. Co.*, 303 U.S. 239, 243 [58 S. Ct. 533, 82 L.Ed. 773] [(1938)]

Hodgson v. Hyatt, 318 F. Supp. 390, 392-393 (N.D. Fla. 1970).

[10] The Court will not engage in a detailed analysis of the testimony in this opinion. The Court's own impressions of the testimony of Drs. Hakala and Caldwell of defendant Exxon, as well as of the self-serving memoranda evidently prepared by Dr. Caldwell in anticipation of litigation, but admitted into evidence without objection, lead clearly to the conclusion of willfully illegal conduct by that corporation under this or any other standard of "willfulness" with which this Court is familiar. The testimony of Mrs. Rogers regarding her conversations with Dr. Caldwell, and the testimony corroborating plaintiffs' allegations of Exxon's scheme to rid itself of older workers, beginning before and continuing after the effective date of the Act, amply support the award of liquidated damages for willful violation of the ADEA. By its verdict on liability and damages, the jury found plaintiffs' witnesses credible; the Court can reach no other conclusion than that defendant's illegal conduct was willful within the meaning of § 626(b).

[11] It is the Court's view, however, that "amounts owing" under the ADEA refers only to out-of-pocket pecuniary loss, represented in this case by the $30,000 stipulated damages. In *Monroe v. Penn-Dixie Cement Corp., supra*, Chief Judge Smith observed:

> Although the Act speaks in terms of recovery of "unpaid minimum wages or unpaid overtime compensation," if the court determines that an aggrieved person

> suffered a pecuniary loss because of a violation of the Act, it is agreed the court should order the violator to repay such loss and for the purposes of the Act, any amount so paid will be deemed to be "minimum wages or unpaid overtime compensation." See Halgren, Age Discrimination in Employment Act of 1967, 43 L.A.B. Bull, 361, 364 (1968).

335 F.Supp. at 234-235, n. 3.

This Court agrees that the liquidated damages provision is best construed as limited to "pecuniary loss." In incorporating the provisions of the Fair Labor Standards Act into the ADEA, Congress obviously intended to provide for analogous treatment of the analogous elements of unpaid minimum wages/overtime compensation, in the FLSA context, and out-of-pocket loss in the case of the ADEA. In either situation, those wages and benefits the employee has lost because of the statutory violation are effectively doubled by the provision for liquidated damages. This additional award "is not penal in its nature but constitutes compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages." *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 707, 65 S.Ct. 895, 902, 89 L.Ed. 1296 (1945).

For these reasons, the Court awarded an additional $30,000 liquidated damages in the instant case, but denied the application for liquidated damages with regard to the jury award of damages for pain and suffering.

III. MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND FOR A NEW TRIAL.

A. *Judgment n. o. v.*

Defendant moved for judgment notwithstanding the verdict, and in the alternative for a new trial, pursuant to

Rule 50(b) of the Federal Rules of Civil Procedure. Defendant was entitled to move for judgment n. o. v., having moved for a directed verdict both after the plaintiff's case and at the close of all the evidence.

[12] The standard of proof on such a motion is like that for a motion for a directed verdict. Indeed, it has been uniformly held that a motion for judgment n. o. v. "may not be granted unless as a matter of law it is found that [plaintiff] failed to present a case for the jury, and a verdict in [defendant's] favor should have been directed at the end of the trial." *Neville Chemical Co. v. Union Carbide Corp.*, 422 F.2d 1205, 1210 (3rd Cir.) (Adams, J.), *cert. denied*, 400 U.S. 826, 91 S.Ct. 51, 27 L.Ed. 2d 55 (1970). The appropriate test is whether, when the evidence is viewed most favorably to the non-moving party and all reasonable inferences are drawn in its favor, the court determines that there is not sufficient evidence upon which the jury could properly have found for the non-moving party. 9 Wright & Miller, *Federal Practice and Procedure* § 2524 (1971).

As the Third Circuit held in *Lewin v. Metropolitan Life Insurance Co.*, 394 F.2d 608, 613 (1968), citing *Morris Bros. Lumber Co v. Eakin*, 262 F.2d 259 (3rd Cir. 1959) (Maris, J.):

> In determining whether judgment n. o. v. should be awarded, the court should consider "only the question of law as to whether when all the evidence is considered, together with all reasonable inferences which may be drawn therefrom most favorably to the plaintiff, there is a total failure or lack of evidence to prove any necessary element of the plaintiff's case. The rule has not withdrawn from the jury and given to the trial judge the exclusive power

of the jury to weigh the evidence and to determine questions of fact."

The Third Circuit has stated the standard of sufficiency of evidence to present an issue for the jury:

> . . . and if the evidence is of such character that reasonable men, in an impartial exercise of their judgment may reach different conclusions, the case should be submitted to the jury.

Silverii v. Kramer, 314 F.2d 407, 409 (3rd Cir. 1963).

[13] Under these tests, it is clear that the Court may not grant judgment notwithstanding the verdict in favor of defendant, either on the issue of liability or on the issue of damages. The Court finds the evidence of illegal conduct and of pain and suffering clear and compelling, and the motion for judgment n. o. v. has accordingly been denied.

B. *New Trial*

[14] Once a motion for judgment n. o. v. is denied, an alternative motion for a new trial is to be considered as if it has been made independently, pursuant to Rule 59 of the Federal Rules of Civil Procedure. Such a motion is "addressed to the sound discretion of the district court." *Grove v. Dun & Bradstreet, Inc.*, 438 F.2d 433, 438 (3rd Cir. 1971). The difference between the standards of proof for a motion for judgment n. o. v. and for a motion for a new trial was set out by the Eighth Circuit in *Fireman's Fund Ins. Co. v. Aalco Wrecking Co., Inc.*, 466 F.2d 179, 186 (8th Cir. 1972), *cert. denied*, 410 U.S. 930, 93 S.Ct. 1371, 35 L.Ed.2d 592 (1973), quoting *Simpson v. Skelly Oil Co.*, 371 F.2d 563, 566-567 (8th Cir. 1967), where the Court held:

> There is a difference in the function of a judge when he is ruling on a motion for a directed verdict or a judgment n. o. v. and when he passes on a motion for a new trial. . . .
>
> In the former instance, it is his duty to accept the plaintiff's version as true for the purposes of the motion, notwithstanding the existence of strong testimony to the contrary; the judge is not concerned with the weight of the evidence. On the motion for new trial, however, he has wider, *though not unlimited*, latitude and he may set the verdict aside where it is against the weight of the evidence, or to prevent injustice.

(Emphasis in *Fireman's Fund*)

Defendant Exxon asserted two grounds for the granting of a new trial: (1) that the verdict of liability was against the weight of the evidence, and (2) that the verdict of damages for pain and suffering was excessive.

In *Lind v. Schenley Industries, Inc.*, 278 F.2d 79 (3rd Cir. 1960 [en banc]) (Biggs, C. J.), *cert. denied*, 364 U.S. 835, 81 S.Ct. 58, 5 L.Ed.2d 60 (1960), the Court distinguished between a motion for a new trial based upon a claim that the verdict was against the weight of the evidence, and such a motion based on claimed errors or other defects during the trial, "which resulted or which may have resulted in the jury receiving a distorted, incorrect, or an incomplete view of the operative facts, or . . . creat[ed] a condition whereby the giving of a just verdict was rendered difficult or impossible." 278 F.2d at 90. It is clearly the former which is at issue here. The Court continued:

> But where no undesirable or pernicious element has occurred or been introduced into the trial and the trial judge nonetheless grants a new trial on the ground that the verdict was against the weight of the evi-

> dence, the trial judge in negating the jury's verdict has, to some extent at least, substituted his judgment of the facts and the credibility of the witnesses for that of the jury. Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts. It then becomes the duty of the appellate tribunal to exercise a closer degree of scrutiny . . . in order to protect the litigants' right to jury trial.

Id.

[15, 16] Where a trial is long, complicated and remote from the ordinary juror's experience, as in patent cases, the trial court should look more closely at the verdict than it permissibly may where the issues are essentially of credibility. *Lind, supra*, at 91. *See Hourston v. Harvlan, Inc.*, 457 F.2d 1105, 1107 (3rd Cir. 1972); *Grove v. Dun & Bradstreet, supra*. In the instant case, the issue of liability resolved into one of credibility of the witnesses, and this Court will not intrude upon the jury's function in that area. In addition, the Court cannot say it has been "left with the definite and firm conviction that a mistake has been committed," and therefore grant a new trial on the basis of a verdict against the weight of the evidence. 11 Wright & Miller, *Federal Practice and Procedure* § 2806 (1973). *See Carpenter v. Koehring Co.*, 391 F. Supp. 206, 208-209 (E.D.Pa.1975). In *Gebhardt v. Wilson Freight Forwarding Co.*, 348 F.2d 129, 133 (3rd Cir. 1965), the Court of Appeals elaborated this standard:

> If the evidence in the record, viewed from the standpoint of the successful party, is sufficient to support the jury verdict, a new trial is not warranted merely because the jury could have reached a different result. .... Neither the trial court nor this Court may substitute its judgment for that of the jury on disputed issues of fact.

Only if this Court found the jury mistaken and its verdict clearly wrong, although supported by some evidence, could a new trial conceivably be granted. *See Jackson v. Baldwin-Lima-Hamilton Corp.*, 252 F.Supp. 529, 537 (E.D.Pa.), *aff'd* (3rd Cir.), *cert. denied*, 383 U.S. 803, 87 S.Ct. 189, 17 L.Ed.2d 117 (1966). The Court cannot make such a finding here.

[17] Defendant's position is considerably stronger, however, with regard to its claim that the $750,000 award of damages by the jury was excessive. The applicable standard is whether the Court finds the jury's award "shocking, unfair or biased." *Frankel v. Heym*, 466 F.2d 1226 (3rd Cir. 1972) (Hastie, J.). The following district court formulation of the appropriate test was affirmed by the Third Circuit:

> Damages assessed by a jury are not to be set aside unless shocking to the judicial conscience or so grossly inadequate as to constitute a miscarriage of justice . . . or unless the jury's award indicates caprice or mistake or a clear abuse of its fact-finding discretion or the clear influence of partiality, corruption, passion, prejudice, or a misconception of the law. [citations omitted] The trial judge should be extremely reluctant to interfere with the time-honored power of the jury, in the exercise of its collective judgment, to assess the damages sustained by the plaintiff.

Tann v. Service Distributors, Inc., 56 F. R.D. 593, 598 (E.D.Pa.1972) (Becker, J.), *aff'd*, 481 F.2d 1399 (3rd Cir. 1973).

The Court has found the size of the damage award in this case to be unfair to defendant, though not the product

of corruption, prejudice or misconception of law. It is the Court's view that the verdict, albeit excessive, manifested the jury's outrage at defendant's conduct and its desire to award the maximum permissible recovery to plaintiffs. Accordingly, the Court has denied the motion for a new trial on the condition that plaintiffs remit $550,000 of the jury's award. *Linn v. United Plant Guard Workers*, 383 U.S. 53, 65-66, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966). Such a remittitur reduces the award to the maximum amount, in the Court's opinion, that the jury could permissibly have awarded. *United States v. 1160.96 acres of land*, 432 F.2d 910, 913-914 (5th Cir. 1970); *Gorsalitz v. Olin Mathieson Chemical Corp.*, 429 F.2d 1033, 1047 (5th Cir. 1970). *See Bonura v. SeaLand Service Inc.*, 512 F.2d 671, 672 (5th Cir. 1975) (dissenting opinion of Goldberg, J.).

[18] Before the instant case went to the jury on the issue of damages, plaintiffs' counsel asked the Court's permission to suggest the figure of $200,000 as the appropriate recompense for the pain and suffering of plaintiffs' decedent. (Tr. 5/16/75; 34-35) The request was denied. After a careful and independent review of the evidence, this Court has concluded that that figure represents the maximum verdict the jury could permissibly have awarded. The Court's conclusion is not based solely on plaintiffs' view of the proper award, as evidenced by counsel's request, but principally on the Court's own review of the medical testimony and exhibits, as well as the other evidence adduced at trial.

Defendant also sought a new trial on the basis of certain prejudicial errors alleged to have been committed by the Court at trial. These matters are preserved for possible review, and the Court finds no reason to disturb its prior rulings.

By consent of counsel, interest on the judgment of $260,000 in plaintiffs' favor will run from May 27, 1975. (Tr. 5/16/75: 42-45) Costs will be taxed against defendant.

Counsel for plaintiffs will submit an appropriate form of judgment in the amount of $260,000 plus interest and $65,000 for attorneys' fees, within ten (10) days hereof, with the consent of counsel for defendant to its form endorsed thereon.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 76-1114
76-1115

GLADYS E. ROGERS and MARGARET A. ROGERS,
as Co-Executrices of the Estate of
DILWORTH T. ROGERS,
Cross-Appellants in No. 76-1114
Appellees in No. 76-1115
v.

EXXON RESEARCH AND ENGINEERING COMPANY,
a Delaware Corporation,
Appellant in No. 76-1115
Cross-Appellee in No. 76-1114

APPEALS FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. Civil No. 681-70)

Argued November 9, 1976
Before: ADAMS and WEIS, *Circuit Judges* and FOGEL,*
District Judge.

Murry D. Brochin, Esq.
Of Counsel

Lewis J. Paper, Esq.
David W. Mills, Esq.
On the Brief

---

* Herbert A. Fogel, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

Shearman & Sterling
53 Wall Street
New York, N.Y. 10005
Of Counsel

Vedder, Price, Kaufman,
Kammholz & Day
800 Third Avenue
New York, N.Y. 10022
Of Counsel

Murry D. Brochin, Esq.
Lowenstein, Sandler, Brochin,
Kohl & Fisher
744 Broad Street
Newark, New Jersey 07102
Attorneys for Gladys E. Rogers and
Margaret A. Rogers

Thomas L. Morrissey, Esq.
Carpenter, Bennett & Morrissey
744 Broad Street
Newark, New Jersey 07102
Attorneys for Exxon Research
and Engineering Company

Richard D. Godown, Esq.
General Counsel
1776 F Street, N.W.
Washington, D.C. 20006

Robert E. Williams, Esq.
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Attorneys for National Association of Manufacturers
of the United States of America, on the Brief
as Amicus Curiae.

OPINION OF THE COURT
(Filed January 20, 1977)

WEIS, *Circuit Judge*.

Although involuntary retirement after lengthy service may be a traumatic experience for an employee, statutory silence circumscribes the relief that can be obtained. We conclude that an Age Discrimination in Employment Act suit may be a proper subject for a jury trial but that there can be no monetary damages for "pain and suffering" in the nature of emotional distress. Accordingly, we vacate a district court's judgment which incorporates a substantial award for such damages.[1]

Dr. Dilworth T. Rogers worked for the Exxon Corporation from 1938, except for a one year absence, until his involuntary retirement on September 1, 1969. He contended that his separation from the company was the result of age discrimination and brought suit under the Age Discrimination in Employment Act of 1967, (ADEA), 29 U.S.C. §§ 621 *et seq*. Dr. Rogers died on March 29, 1973 and his executrices were substituted as plaintiffs. A jury awarded the plaintiffs $750,000 for pain and suffering as well as $30,000 in compensatory damages. The latter amount was doubled by the court because the defendant's conduct had been willful. After plaintiffs accepted a remittitur of $550,000 on the pain and suffering verdict, defendant's post-trial motions were denied, and judgment was entered in favor of plaintiffs.

Dr. Rogers was a research scientist who had done extensive post-graduate work in chemistry and had earned a doctorate in that field. Active in professional societies,

1. The opinion of the district court is reported at 404 F. Supp. 324 (D.N.J. 1975).

he was credited with fifty-one patents and, during his service with Exxon, was designated as its first Senior Research Associate. In his early years with the company, promotions and salary increases came fairly frequently but, beginning in 1959, when Dr. Rogers became 50 years of age, his relations with the company began to deteriorate. The plaintiffs asserted that the reversal of his fortunes was the result of Exxon's policy of age discrimination which included a policy of harassment designed to make him leave the company. The defendant, however, contended that Dr. Rogers became frustrated and dissatisfied because he could not climb the administrative ladder of the company.

Dr. Rogers, unhappy with his job assignments, the technical facilities designated for his use, and the failure to receive periodic salary increases, found his relationships with superiors and co-workers becoming strained. The tensions of his employment were accompanied by emotional problems which in turn were reflected in his physical health.

On March 7, 1969, after a disagreement with a superior over his work, Dr. Rogers left his employment in an emotional turmoil, taking an extended sick leave. In the ensuing months, he suffered a number of physical ailments and a condition diagnosed in part as a situational neurosis. During this period, Dr. Rogers' attending physician and the company medical director exchanged information, the nature of which was disputed at the trial. On August 1, 1969, the company wrote to Dr. Rogers that he would be retired for medical reasons. Despite his protests, the retirement became effective on September 1, 1969, and he received benefits thereafter in accordance with the company retirement plan.[2] At trial, the defense contended that the sole reason for retirement was medical disability.

2. The amount of the payments was not established at trial. Defense counsel, in a leading question to one of the plaintiffs, inquired if the monthly ben-

Plaintiffs claimed damages for earnings lost because of the company's failure to grant salary increases before 1969, in addition to the differential between the pension payments and what would have been received had Dr. Rogers continued in active service. Further, claims were made for the emotional and physical problems caused by Dr. Rogers' involuntary retirement, as well as the onerous treatment he had received before that time. The trial court ruled that the plaintiffs were entitled to a jury trial and the ADEA permitted a recovery of damages for pain and suffering.

After the jury in the bifurcated trial found liability against the defendant, the parties stipulated that compensatory damages were $30,000. Following the verdict on damages, the parties agreed to submit the question of willfulness to the judge rather than to the jury. The district judge determined the actions of the defendant to have been willful and doubled the compensatory damages to $60,000 as permitted by the statute, 29 U.S.C. § 626(b). However, he held the doubling provision inapplicable to the pain and suffering award.

RETIREMENT UNDER A BONA FIDE PLAN

Defendant raises a number of interesting issues in its appeal, the first of which is the Act's exemption of retirement pursuant to a bona fide plan.

The ADEA prevents discrimination in an employee's compensation, terms, conditions or privileges of employment because of age. However, it exempts retirement pursuant to a bona fide pension plan that is not a subterefits were not approximately $1,000. Over plaintiffs' objection, the question was stricken before it could be answered. Plaintiffs' counsel, however, at that point stipulated that the retirement plan was bona fide, and we therefore assume that the amount of monthly payment was substantial.

fuge to evade the purposes of the Act, 29 U.S.C. § 623(f)(2).[3] The heart of plaintiffs' case, as well as the fundamental premise for the district court's evidentiary rulings and charge to the jury, was that the Act bans involuntary retirement before age 65 even under an otherwise bona fide plan, if age played any part in the decision.

We recently examined the legislative history of the ADEA and the purposes behind the § 623(f)(2) exemption in detail and need not repeat our lengthy discussion here. After careful study, we concluded that the Act does not prohibit involuntary retirement at age 60 with an adequate pension pursuant to a bona fide retirement program. *Zinger v. Blanchette*, __ F.2d __ (No. 76-1249, 3d Cir. ____). We observed that the age discrimination present in most involuntary retirement plans is generally not barred by the Act. Our holding in *Zinger*, contrary to the district court's theory in the case *sub judice*, requires that the judgment here be vacated.

However, on the record before us, we are unable to enter judgment for the defendant.[4] Moreover, even if Rogers could properly have been retired under the age and service qualification, the claims that he was mistreated and did not receive promotions and salary increases because of age, if proven, constitute arguable violations of the Act.[5] No

3. "(f) It shall not be unlawful for an employer . . . —

• • •

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual; . . . ."

4. During side bar conferences at the trial and at oral argument in this appeal, the defendant contended that it could have retired Dr. Rogers under its plan providing benefits in conformance with an age and length of service computation. Apparently it was somewhat similar to the one which we found permissible in *Zinger*, but the Exxon plan was not received in evidence because of plaintiffs' objections. Therefore, we must remand to the district court for completion of the record.

5. We do not know if the benefits under the medical retirement were inferior to those payable under the age and service provisions. However, the

effort was made to segregate the items of pre-retirement damages from those of the post-retirement period and, consequently, we cannot determine what violations the jury found and whether any sums might be due if the post-retirement events are excluded. Since a new trial must be granted, it is necessary that we review most of the points raised on appeal.

JURY TRIAL

The district court properly refused to strike the plaintiffs' request for a jury trial. The statute does not specify whether trial by jury is available. However, there is a provision that:

> "[T]he court shall have jurisdiction to grant such legal or equitable relief as may be appropriate . . . including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section." 29 U.S.C. § 626(b).

Subsection (c) provides that an aggrieved person may bring a civil action for legal or equitable relief.

A suit for damages consisting of back wages arising out of the breach of an employment agreement is a routine contract action where the parties would be entitled to a jury under the Seventh Amendment. The fact that the right to recover wages is granted not by common law but by statute does not change the essential nature of the case.

> "[W]hen Congress provides for enforcement of statutory rights in an ordinary civil action in the district

plaintiffs do not contend that the medical retirement was a sham to deprive them of more favorable treatment under the age retirement and, accordingly, that issue is not before us.

> courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law." *Curtis v. Loether*, 415 U.S. 189, 195 (1974)[6]

The enforcement provisions of the ADEA, 29 U.S.C. § 626, refer to the corresponding sections of the Fair Labor Standards Act, 29 U.S.C. §§ 216, 217, and use the verbiage in those sections in categorizing damages as "unpaid minimum wages or unpaid overtime compensation." Suits for damages under the Fair Labor Standards Act are within the Seventh Amendment. *Wirtz v. Jones*, 340 F.2d 901, 904 (5th Cir. 1965); *Olearchick v. American Steel Foundries*, 73 F. Supp. 273 (W.D. Pa. 1947);[7] 5 J. MOORE, FEDERAL PRACTICE ¶ 38.27 (1976). In the case *sub judice*, since Dr. Rogers had died, equitable relief in the nature of reinstatement was not possible and the only remedy sought was money damages.

Accordingly, in considering the intrinsic nature of the suit, as well as the ADEA's incorporation of pertinent sections of the Fair Labor Standards Act, we conclude that the parties were entitled to a jury trial. *Cleverly v. Western Electric Co.*, 69 F.R.D. 348 (W.D. Mo. 1975); *Chilton v. National Cash Register Co.*, 370 F. Supp. 660 (S.D. Ohio 1974); *cf. Morelock v. NCR Corp.*, __ F.2d __ (Nos. 75-

6. Although back pay awards are sometimes described as equitable in nature, *see* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1937); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), that premise does not militate against this position. In J & L Steel, *supra*, the Court was careful to point out that the award there was the result of an administrative proceeding, not a common lawsuit. In Albemarle, the Court noted that the award of back pay was discretionary and thus was considered equitable. Here, the statute employs the mandatory "shall."

7. These cases were decided before ADEA was enacted, and presumably Congress was aware of them. At least some members assumed that juries would hear ADEA cases. In a colloquy on the floor, Senator Javits said that in an age discrimination suit "[a] jury will answer Yes or No." 113 Cong. Rec. 31255 (1967).

2220, 75-2282, 6th Cir. Dec. 20, 1976); *Pons v. Lorillard*, 69 F.R.D. 576 (M.D. N.C. 1976); *Developments in the Law—Title VII*, 84 Harv. L. Rev. 1109, 1265-1269 (1971).

PAIN AND SUFFERING DAMAGES

While recognizing that no specific provision in the statute or decisional law authorized recovery for emotional and psychic distress, the district court submitted that item of damages to the jury. The trial judge reasoned that the ADEA created a new tort and conferred broad remedial authority upon the courts to redress statutory transgressions. We recognize the thoughtful approach utilized by the district court and the policy reasons which could be cited to support its position.[8] We differ, however, because we believe the statutory plan of enforcement is inconsistent with the district court's expansive interpretation.

As we have seen, the ADEA incorporates part of the enforcement powers of the Fair Labor Standards Act.[9] Under the FLSA, the employer is liable to the employee for "unpaid minimum wages or unpaid overtime compensation" and that amount may be doubled to provide for "liquidated damages." In addition, that statute provides for injunctive relief to restrain violations.

After the references to the Federal Fair Labor Standards Act, the ADEA correlates the two statutes by stating:

> "Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable in cases of willful violations. . . ." 29 U.S.C. § 626(b).

In addition, the court is given jurisdiction to grant such

> "legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section."

Although orders to force employment, reinstatement or promotion are equitable in nature, collections of judgments for lost earnings generally are legal actions. The statute does not mention any money damages other than "amounts" measured by "unpaid minimum wages or unpaid overtime compensation" and "liquidated damages."

During consideration of the ADEA, various members of Congress commented on the emotional problems caused by inability to secure employment because of age discrimination. Against this background, the court reasoned that to make the victim whole, the statute mandated "legal" relief in the form of an award for psychic distress, characterized as "pain and suffering."[10] We are unable to accept the court's conclusion.

8. The district court's opinion was discussed with approval in Note, *Age Discrimination—Compensatory Damages for Pain and Suffering Held Recoverable Under the Age Discrimination in Employment Act of 1967*, 7 Seton Hall L. Rev. 642 (1976). In Combes v. Griffin Television, Inc., — F. Supp. —, 13 F.E.P. Cases 1455, 1460 (W.D. Okla. 1976), the district court held that pain and suffering could be awarded in an ADEA case. *Contra* Sant v. Mack Trucks, Inc., — F. Supp. —, 13 F.E.P. Cases 854 (N.D. Cal. 1976).

9. 29 U.S.C. § 626(b) refers to the "powers, remedies and procedures provided in sections 211(b), 216 (except for subsection (d) thereof) and 217 of this Title and subsection (c) of this section [§ 626]."

10. The court also drew some analogies from Title VII, 42 U.S.C. § 2000(e), which proscribes employment discrimination based on race, color, religion, sex or national origin. That statute provides for back pay, reinstatement, hiring or "any other equitable relief as the court deems appropriate." The two statutes are not consistent because Congress made the ADEA enforcement provisions a hybrid of the Fair Labor Standards Act and Title VII. Thus, it is possible to have lost earnings doubled because of discrimination based on age, but not on race or religion. While it is logically beguiling to interpret the statutes in harmony, their clear language often will not permit it. Consequently, the decisional law under Title VII must be read with this caveat in mind.

While some members did express concern about the anxiety faced by older persons in search of employment, there is no indication that Congress thought the means which it adopted to make employment a reality were inadequate to afford reasonable relief. Thus, the fear of being unable to earn a livelihood in one's later years should be diminished by the availability of court-ordered employment or reinstatement. Congress might well have believed that the resumption of productive work removes the root of the emotional anxiety and the monetary deprivation which occurred in the interim is restored by an award for the actual loss. If the employer's conduct has been such as to merit punitive treatment, then he is to be penalized by doubling the award.

Unquestionably, the punitive element is involved to some extent in awards for pain and suffering which are akin to those for emotional distress. It is generally accepted that in a typical tort case the award for pain and suffering varies in proportion to the aggravated nature of the acts establishing liability. In this case, the jury's excessive award of $750,000 for "pain and suffering" is more a condemnation of the defendant's activity than a measurement of the actual distress fairly attributable to the plaintiff's treatment by the company.

Congress saw fit to restrict the penalty provisions of the Act to doubling the amount of lost earnings. To allow psychic distress awards in addition would in a very real sense thwart the limitation Congress thought advisable to impose.

The district court assumed that a "legal damage" award necessarily included compensation for psychic or emotional distress. But that is not necessarily so. In the field of torts, though the desirability of such compensation has become increasingly accepted in recent years, it is not, even now, universally so. *See* W. PROSSER, LAW OF TORTS § 12 (1971 ed.). In the contract area, such awards are the exception and not the rule, 5 A. CORBIN, CONTRACTS § 1076. Congress, legislating on a national basis, would not likely assume that a measure of damages, not uniformly accepted, would be implied in the Act, particularly since jurisdiction is concurrent in both federal and state courts. The mere inclusion of the words "legal relief" is not determinative.

The thrust of the ADEA's enforcement provisions is that private lawsuits are secondary to administrative remedies and suits brought by the Secretary of Labor. During hearings on the bills, the congressional committees emphasized that the most favored method of enforcement was conciliation and mediation.[11] Indeed, those who proposed administration of the Act by the Wage and Hour Division argued that it was better equipped to process complaints than the EEOC which was given that responsibility under Title VII.

The ADEA provides not only that resort must first be had to administrative remedies before a private suit may be filed, 29 U.S.C. § 626(d), *Goger v. H. K. Porter Co., Inc.*, 492 F.2d 13 (3d Cir. 1974), but also that the right to bring a private suit terminates upon the commencement of an action by the Secretary, § 626(c). An entitlement to an award for pain and suffiering without guidelines of any sort is a vague and amorphous concept traditionally found in a private lawsuit but is uncommon in administrative actions. *Cf. Zahorian v. Russell Fitt Real Estate*

11. *See, e.g.*, S. Rep. No. 723, 90th Cong., 1st Sess. 5 (1967); Charme, Age Discrimination in Employment, 11 COLUM. J. LAW & SOC. PROB. 281, 291 (1975); Agatstein, The Age Discrimination in Employment Act of 1967: A Critique, 19 N.Y.L.F. 309, 319 (1973); Protecting the Older Worker, 6 J. LAW REFORM 214, 221 (1972).

Agency, 62 N.J. 399, 301 A.2d 754 (1973).[12] Certainly if an award for such an intangible were to be made in an administrative setting, statutory authorization or administrative regulations would be expected. *See Automobile Workers v. Russell*, 356 U.S. 634, 643 (1958); K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES §§ 2.00-2.12 (1976). The ADEA, however, is completely silent on this important and novel point.

The introduction of a claim for psychic and emotional distress would present serious administrative problems. While the existence of such an item of damages might strengthen the claimant's bargaining position with the employer, it would also introduce an element of uncertainty which would impair the conciliation process. Haggling over an appropriate sum could become a three-sided conflict among the employer, the Secretary, and the claimant. The same drawbacks would apply in a court suit brought by the Secretary where the question of authority between him and the claimant to decide upon an acceptable amount would create another area of dispute. The ADEA's silence on this contingency is another indication that pain and suffering awards were not contemplated by the draftsmen.

The Act provides for determination of the amount of damages by an objective test—the amount of lost earnings. While the exact computation may be the subject of disagreement, that type of dispute is familiar to administrative proceedings and generally not difficult to resolve.

If mental suffering awards are limited to private lawsuits, then once again the conciliation process is jeopardized. The possibility of recovering a large verdict for pain and

12. In that case the majority permitted an agency to make an award for a "minor or incidental award" for pain and suffering in a discrimination case. Three of the seven justices joined in a strong and well-reasoned dissent.

suffering will make a claimant less than enthusiastic about accepting a settlement for only out-of-pocket loss in the administrative phase of the case. The net result can only be to substantially increase the volume of litigation in the trial courts, a development Congress did not desire. Although not insurmountable, these administrative difficulties reinforce our conviction that Congress would have provided specifically for pain and suffering damages had it intended to allow them.

In view of these several considerations, the statutory silence, and the lack of a supportive legislative history, we hold that damages for "pain and suffering" or emotional distress cannot properly be awarded in ADEA cases.[13] We recognize that the result is a disappointing one to persons in the position of plaintiffs here, but Congress allowed no alternative.

ATTORNEYS' FEES

Section 216(b) of the Fair Labor Standards Act provides that in a suit by an employee the court "shall in addition to any judgment awarded to the plaintiff or plaintiffs allow a reasonable attorney's fee to be paid by the defendant." This provision is incorporated into the ADEA, 29 U.S.C. § 626(b). Consequently, attorneys' fees are to be awarded in age discrimination suits in which the employee prevails.

13. In Howard v. Lockheed-Georgia Co., 372 F. Supp. 854 (N.D. Ga. 1974), and Van Hoomissen v. Xerox Corp., 368 F. Supp. 829 (N.D. Cal. 1973), the courts denied recovery for pain and suffering in Title VII cases. *Contra* Humphrey v. Southwestern Portland Cement Co., 369 F. Supp. 832 (W.D. Tex. 1973), *rev'd on other grounds*, 488 F.2d 691 (5th Cir. 1974). Our decision in Rosen v. Public Service Electric and Gas Co., 477 F.2d 90 (3d Cir. 1973), in referring to "compensatory damages" addressed only retirement benefits, a form of back pay proper in a Title VII case. *See* Developments—Title VII, *supra* at 1259-1264; Implying Punitive Damages in Employment Discrimination Cases, 9 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 325 (1974); Duda, Damages for Mental Suffering in Discrimination Cases, 15 CLEV.-MAR. L. REV. 1 (1966).

Brennan v. Ace Hardware Corp., 495 F.2d 368, 374 (8th Cir. 1974); *Monroe v. Penn-Dixie Cement Corp.*, 335 F. Supp. 231, 235 (N.D. Ga. 1971); *cf. Stringfellow v. Monsanto Co.*, 320 F.Supp. 1175 (W.D. Ark. 1970); Note, *Age Discrimination in Employment under Federal Law*, 9 GA. ST. B. J. 114, 127 (1972).

In this case, the district court fixed attorneys' fees based in some degree upon a percentage of the amount recovered for pain and suffering. Since that portion of the judgment is vacated, if the plaintiff succeeds in recovering on other aspects of the case, the district judge no doubt will wish to reevaluate the award for counsel fees.

WILLFULNESS

On June 8, 1973, Judge Leonard Garth, to whom this case was then assigned, formally denied plaintiffs' motion to amend the three year old complaint to allege willfulness. At a preliminary hearing, the judge said:

> "With respect to the other motion to file the Amended Complaint alleging willfulness, it comes too late. I'm denying that application. . . . The age of the complaint, the problems that we have met, the discovery we have met, if now we open up this matter anew it seems to me it would be completely improvident.
>
> • • •
>
> "It seems to me that it is ripe for decision and I will so decide. It is denied."

Although the pretrial order did not list willfulness as an item to be considered in computing damages, the district judge at the trial decided to entertain that issue. Both counsel agreed that, if the matter was properly in the case, it should be submitted to the court and not to the jury.[14]

14. The parties have not raised on appeal any question about the right to have a jury pass upon the issue of willfulness and, therefore, we do not decide that point. *Cf.* Hodgson v. Miller Brewing Co., 457 F.2d. 221 (7th Cir. 1972), and McClanahan v. Mathews, 440 F.2d 320 (6th Cir. 1971), decided under the Fair Labor Standards Act and a section of the Portal to Portal Pay Act, 29 U.S.C. § 260. Although ADEA incorporates 29 U.S.C. §§ 255 and 259, it does not mention § 260. The district court in Chilton v. National Cash Register Co., *supra* at 666, did not comment on this fact in deciding that willfulness was for the court and not the jury. In Cleverly v. Western Electric Co., *supra*, Judge Becker noted the distinction and held that a jury trial on the issue of willfulness was proper.

However, defense counsel properly preserved his objection to the introduction of willfulness into the case.

The defendant contends that the trial judge was bound by the earlier order of Judge Garth and thus the issue was no longer in the case. Plaintiffs argue that, since the statute does not specifically require that willfulness be pleaded, it was not necessary to amend the complaint in any event.

The defendant relies upon *United States v. Wheeler*, 256 F.2d 745 (3d Cir.), *cert. denied*, 358 U.S. 873 (1958), for the proposition that one judge of a cordinate jurisdiction cannot overrule another in the same case. But, as the opinion points out, much depends upon the circumstances. If the first judge is no longer available to rule upon the matter, different considerations apply. Judge Garth was elevated to this court shortly after entering the order of June 8, 1973 and, therefore, was no longer available to preside over the case in the district court. Had he continued in the trial court, he would have had the discretion to reconsider the ruling upon changed circumstances either *sua sponte* or on the motion of party. Moreover, the matter could have been reconsidered at the pretrial conference. The judges assigned to succeed him in the disposition of the case retained this discretion.

The pretrial order did not discuss willfulness. Therefore, the defendant was surely entitled to assume that the issue would not be raised later. Before trial, the plaintiffs asked for neither an amendment to the pretrial order nor for

reconsideration of the denial of the motion to amend. Since there must be a retrial, if plaintiffs wish to assert defendant's willfulness, they should move to amend the pretrial order or request an additional pretrial conference. The district judge will then have the opportunity to determine whether the circumstances justify the injection of willfulness into the litigation. We think it better practice to assert the claim for damages based on willfulness in the complaint—but, if not included there, certainly the matter should be raised at pretrial.

EVIDENTIARY RULINGS

The defendant raises a number of evidentiary rulings which are said to be erroneous. The trial court's reasoning for most of these rulings relied on the premise that a retirement program based on age is not exempt from operation of the Act. Since we have decided otherwise, the relevancy of the evidence must be reevaluated. We are not disposed to rule on most of these matters because of the changed circumstances. We do, however, have some reservations about the remoteness in time of some incidents introduced to show a policy of discrimination.

One matter of evidence does deserve discussion: the destruction of diaries which Dr. Rogers prepared. Defendant contended that Dr. Rogers' emotional problems centered on his inability to get along with fellow-employees, and a number of its witnesses testified to this point. The diaries for the period from 1955 to 1969 related personal difficulties with other Exxon employees as well as details of inventions. Dr. Rogers destroyed the diaries after commensing this litigation and after showing them to the attorney he had originally retained [not present counsel]. To justify adverse comment on the incident, the defense offered to read relevant portions of Dr. Rogers'

discovery deposition describing the contents of the diaries and his reasons for destroying them. The trial judge refused to admit this evidence on the rationale that the destruction could have been due to many reasons unrelated to the lawsuit and, moreover, defendant had produced other testimony on Dr. Rogers' interpersonal relationships. We believe the proffered testimony should have been received in evidence. Under the circumstances, the destruction of the records could reasonably raise an unfavorable inference. *See Stoumen v. Commissioner of Internal Revenue*, 208 F.2d 903, 907 (3d Cir. 1953). The reasons for the action are more properly matters for argument to the jury rather than grounds for exclusion. If the jury accepted the inference, it would corroborate the defendant's witnesses on an important part of the case.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

The plaintiff did not file any proceeding before the Division on Civil Rights of the New Jersey Department of Law and Public Safety, the agency responsible for enforcing that state's prohibition against age discrimination in employment.[15] Under § 14(b) of the Act, 29 U.S.C. § 633(b), no suit may be brought until after 60 days have elapsed from the time of commencing proceedings under state law. This requirement is jurisdictional, *Goger v. H. K. Porter Co., supra*. Ordinarily plaintiff's failure, as in this case, to avail himself of the state administrative remedy would be fatal to his cause of action. However, in *Goger*, we said:

> "[W]e nonetheless consider equitable relief to be appropriate in view of the total absence, to our knowledge, of any judicial decision construing section 633(b) during the period involved here and in view

15. N.J. Stat. Ann. 10:5-1 *et seq.*

> of the remedial purpose of the 1967 Act. In the future, however, we think the Congressional intent that state agencies be given the initial opportunity to act should be strictly followed and enforced." 492 F.2d at 17 (footnote omitted).

See also Sutherland v. SKF Industries, Inc., 419 F.Supp 610 (E.D. Pa. 1976).

Since the suit at bar was filed before our decision in *Goger*, we think that the same relief must apply here. Accordingly, the district court did not err in ruling that *Goger* permitted this case to proceed despite the failure to resort to state administrative remedies.

The judgment of the district court will be vacated and the case will be remanded for further proceedings consistent with this opinion.

TO THE CLERK:

Please file the foregoing opinion.